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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 813

CHARLES HOEH, PERCY GREEN, RICHARD P. HOCH, and JOEL ALLEN,
Petitioners,

vs.

ISAAC A. LOWE, WILLIAM H. HARRISON, EDWARD J. WALSH, JR., CLIFTON W. GATES, ALFONSO J. CERVANTES, CURTIS BROSTROM, FRED BRAMEL, THOMAS SHANNON, GARY GAERTNER, HONORABLE GEORGE CADY and HONORABLE RICHARD BROWN, JAMES L. SANDERS and VINCENT G. ROGERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS
Gaertner, Cady and Cervantes (in His Capacity as Mayor)
in Opposition

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IN THE

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CHARLES KOEN, PERCY GREEN, RICHARD P. KOCH, and JOEL ALLEN,
Petitioners,

vs.

ISAAC A. LONG, WILLIAM H. HARRISON, EDWARD J. WALSH, JR., CLIFTON W. GATES, ALFONSO J. CERVANTES, CURTIS BROSTRON, FRED GRIMES, THOMAS SHANNON, GARY GAERTNER, HONORABLE GEORGE CADY and HONORABLE RICHARD BROWN, JAMES L. SANDERS and VINCENT G. ROGERS,
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OPINION BELOW

The opinion of the United States Court of Appeals is reported at 428 Fed. 2d 876 (1970). The opinion of the United States District Court, Eastern District of Missouri, Eastern Division, is reported at 302 Fed. Supp. 1383 (1969).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 30, 1970. On September 18, 1970, Mr. Justice Blackmun extended the time in which to file this petition for certiorari to and including October 28, 1970. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Sec. 1254(1).

ORDINANCES INVOLVED

Section 762.030 of the St. Louis Ordinances:

Disturbances

762.030 **Public disturbance of the peace.**—No person shall disturb the peace of others by noisy, riotous or disorderly conduct, nor by violent, tumultuous, offensive or obstreperous conduct or carriage, nor by loud or unusual noises, nor by unseemly, profane, obscene, indecent, lewd or offensive language, calculated to provoke a breach of the peace, nor by assaulting, striking or fighting any other person in any park, street, alley, highway, thoroughfare, public place or public resort (1948, C. 46, a. 20).

Section 763.010 of the St. Louis Ordinances:

Unlawful Assembly

763.010 **Prohibition.**—No person shall join or assemble with another person or persons to act in concert to do any unlawful act with force or violence, against the property of the City or the person or property of any other person, or against the peace or to the terror of other persons, nor make any movement or preparation for such act (1948, C. 46, e. 80).

Section 765.010 of the St. Louis Ordinances:

Loitering

765.010 **Prohibition.**—No person shall loiter at the corner of streets, or in the vicinity of any place of amusement, or hotel, or public building, or thoroughfare, and refuse to disperse or vacate such place when requested so to do by a police officer (Ord. 47396, Jan. 28, 1955).

QUESTIONS PRESENTED

1. Whether petitioners were entitled to a federal judicial declaration that Sections 762.030, 763.010 and 765.010 of the St. Louis Ordinances which were alleged to be unconstitutional by reason of vagueness and overbreadth.

2. Whether petitioners were entitled to injunctive and declaratory relief against certain procedural practices in St. Louis City Court Number One which were alleged to be unconstitutional.

3. Whether the trial court's factual determination that there was no pattern or practice of bad faith law enforcement and prosecution was correct.

STATEMENT OF THE CASE

Petitioners brought this cause as an alleged class action claiming that they were members and officers of certain civil rights, community action and student activist groups in the City of St. Louis, Missouri. They brought this action for temporary injunctive relief as well as for permanent injunctive relief and declaratory relief concerning the peace disturbance ordinance, the unlawful assembly ordinance and the loitering ordinance, as well as against certain alleged practices and procedures of one of the two city courts, as well as certain alleged patterns of practice

by the Metropolitan Police Department. Named as defendants were various officials of the City of St. Louis and the Metropolitan Police Department as well as the City Counselor and one City Judge. After several days of hearing, the trial court sitting as the trier of fact denied a motion for preliminary injunction. Thereafter, following further hearing, the trial court entered its judgment denying the permanent injunctive relief and declaratory relief prayed for by the petitioners. The cause was dismissed at plaintiffs' costs August 4, 1969 (Pet. App. 1a-34a). An appeal was perfected to the United States Court of Appeals to the Eighth Circuit from that judgment. The judgment of the trial court was affirmed on June 30, 1970 (Pet. App. 35a-38a).

ARGUMENT

1. The approach of the District Court in reviewing the peace disturbance and unlawful assembly ordinances was correct and the District Court's action in denying the declaratory relief as to these ordinances was proper under the rulings that have been set down by this Court. The prototype for the action filed by the petitioners is **Dombrowski v. Pfister**, 380 U. S. 479. There declaratory relief was granted and the statute involved was declared to be unconstitutional after a finding of bad faith enforcement of the statute. Thereafter, in **Zwickler v. Koota**, 389 U. S. 241, 254, the rules as set forth in **Dombrowski** were elaborated upon. It was indicated there that an absence of special circumstances as found in **Dombrowski** did not justify the District Court from refusing to consider the appropriateness of declaratory relief and that abstention was not appropriate. However, as to the appropriateness of declaratory relief, it was subsequently clearly held that the decisions in **Dombrowski** and **Zwickler** were not meant to obviate the traditional requirement that the petitioner have a proper standing to bring the action. **Golden v. Zwickler**, 394 U. S. 103. Therefore, while it is true that the District Court may not abstain, it is still under the obligation to make a determination of whether declaratory relief is appropriate under the circumstances. Not only must the petitioner have a "standing to sue", there must also be a "case of actual controversy". The petitioners are obviously confusing the question of abstention with the question of declaratory relief being appropriate under the circumstances. As is seen in the holding in **Zwickler v. Koota** (supra), at p. 254, after holding that abstention was inappropriate, the Court then directed the District Court to determine the appropriateness of the declaratory request. This is precisely the approach taken by the District Court in the present case and the Court properly ruled that declaratory relief regarding the constitutionality of these

ordinances was not appropriate (Pet. App. 28a). From a reading of the District Court's opinion it is clear that the court felt the circumstances were such as to justify abstention.

2. The District Court's approach to reviewing the St. Louis loitering ordinance and the court's refusal to grant declaratory relief regarding this ordinance was proper. The court found that "no sufficient live controversy" existed. Further, that the petitioners were unable to show that they were in immediate "danger of sustaining some direct injury" (Pet. App. 29a). There was but one incident in which a party or member of the alleged class was arrested or threatened with arrest under this ordinance. This involved petitioner Koch. However, the charge was later dismissed. There was no other evidence presented as to actual or threatened use of this ordinance. It is clear that the District Court correctly found that this one isolated incident involving the ordinance which occurred months prior to the filing of the complaint by the petitioners was not of sufficient immediacy to entitle petitioners to a declaratory judgment. The court's holding that declaratory relief regarding the constitutionality of the loitering ordinance was inappropriate is again entirely consistent with the authority of the holding in **Golden v. Zwickler** (supra).

Petitioners continue to attempt to bring before the Court charges that arose under an ordinance against which they have not sought any relief. That ordinance is "failure to obey the reasonable request of a police officer". The attempt is made to claim that charges arising out of the "failure to obey" ordinance are the same as those arising under the loitering ordinance. The "failure to obey" ordinance is an entirely separate and distinct ordinance and respondents find it difficult to understand how arrests made under authority of one ordinance can be used to demonstrate that an actual controversy exists regarding

another ordinance. If the "failure to obey" ordinance was thought to be unconstitutional by petitioners, they should have sought declaratory relief regarding it and not the loitering ordinance.

3. Petitioners suggest that the very existence of a statute or ordinance could have a chilling effect upon petitioners and members of their class regarding their protest activities and that this is so even when there are absolutely no arrests or prosecutions under the questioned statute or ordinance. This argument carried to conclusion would mean that any person who felt that the provisions of the statute or ordinance were too broad, although they had absolutely no connection with them, could seek the federal court jurisdiction to interfere. This was never intended to be the case. And while theoretically speaking, perhaps the existence of a provision of a statute or ordinance could have a chilling effect, there was absolutely no evidence whatever in the present case that the petitioners patterned their activities or postponed or suspended any of them by their experiences that were described in evidence. Had there been some proof along these lines the District Court may have been able to reach a different conclusion, but petitioners' proof failed in this respect. Petitioners attempt to impress this Court with their sincerity in their position, yet leave unexplained the failure of petitioner Koen to testify. It is contended that he was integrally affected by these ordinances. For some unknown reason he failed to present his views to the trial court and his absence is left unexplained permitting this Court to speculate as to the reason. Considerations such as these support the District Court's finding that the petitioners had no standing to seek the declaratory relief they requested.

4. The three St. Louis ordinances challenged by petitioners contain no constitutional defects of vagueness or overbreadth which required any declaratory relief requested

in the District Court. As pointed out by petitioners in their petition for a writ of certiorari, the issues presented by these ordinances "are far from novel" (Pet. Cert. p. 15).

(a) The unlawful assembly ordinance is not unconstitutionally vague or overbroad. In **Rollins v. Shannon**, 292 Fed. Supp. 580 (E. D. Mo. 1968), a three-judge court upheld the constitutionality of the Missouri unlawful assembly statute. The language of that statute and the ordinance are quite similar. It was pointed out in **Rollins** (supra) that the act to be done was to be with force and violence and as such the acts were removed from the ambit of peaceful conduct which would be protected by the First Amendment. The court also cited cases including **Heard v. Rizzo**, 281 Fed. Supp. 720 (E. D. Pa. 1968), affirmed 392 U. S. 646, which upheld a similar statute. In passing, **Ex parte Coder** (Mo. App.), 44 S. W. 2d 179, should be mentioned. This case presented an example of the Missouri State Court giving a narrowing construction to a statute by refusing to include as an "unlawful act" activity protected by the First Amendment. The activity there was found to be protected by the First Amendment and therefore not unlawful. Since there is no suggestion found that Missouri courts would give anything but the same narrow construction to the city ordinance, this "narrowing interpretation" tends to remove any overbreadth or chilling effect of the ordinance in question upon the petitioners.

(b) The peace disturbance ordinance is not unconstitutionally vague or overbroad. Because of the similarity of the State of Wisconsin's disorderly conduct statute and the present peace disturbance ordinance, great reliance is placed upon **Zwicker v. Boll**, 270 Fed. Supp. 131 (W. D. Wis. 1967), affirmed 391 U. S. 353 (1968). The statute there provided "whoever does any of the following may be fined not more than $100.00 or imprisoned not more

than 30 days, (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." It is respondents' position that the Constitution does not require impossible standards of specificity in penal statutes or ordinances. The Constitution requires only that the regulation convey a sufficiently definite warning as to the proscribed conduct when measured by a common understanding and practices. Words in the present city ordinance such as **violent, tumultuous** and **riotous** are all of common usage which describe affirmative types of conduct which tend to disturb and disrupt good order which the state may prohibit. The language contained in the ordinance is descriptive of conduct and speech which in normal circumstances would be unprotected by the First Amendment. The ordinance makes an offense the actual breach of the peace, and not the expression of an idea which leads to the disturbance of the peace. Whether or not a more precise and clearly defined ordinance could be drawn is not the question. It is whether the ordinance as it stands can be reasonably and easily interpreted to exclude from its application conduct which is protected by the First Amendment. In support of respondents' position, it is pointed out that the District Court had evidence before it which presented the fact that this ordinance did not have any "chilling effect" on any First Amendment rights. There were as many as 50 or more demonstrations which had been engaged in by petitioner Koch (R. 112),[1] and but two arrests in a three year period (R. 110, 111). The trial Court made a similar finding regarding members of the alleged class in the City of St. Louis over the past several years and pointed out (R. 507) that out of the numerous demonstrations many witnesses could point out

[1] R. refers to the entire record appendix which was before the Court of Appeals.

but one arrest. The fact that the members of the alleged class were able to demonstrate without arrest should have instilled confidence, if anything, that if their conduct remained peaceful and lawful they would be free from police interference. This is recognition by the prosecuting officials that such conduct is protected by the First Amendment. On the other hand, if petitioners contend that this ordinance had a "chilling effect" on conduct such as that by members of petitioner Green's organization, in attempting to chain themselves to a parade float which is described in paragraph 5(i) of petitioners' complaint, the respondents can only reply that the ordinance is achieving its purpose. The ordinance was likewise designed to curtail conduct such as that of witness Goldman who chained herself to a revolving door of a downtown department store (R. 447-448).

(c) There was simply no showing of any actual controversy or any immediacy in the District Court regarding the constitutionality of the loitering ordinance. As mentioned in paragraph (2) above, there was only one incident presented to the District Court involving the loitering ordinance, and that charge was subsequently dismissed before this cause was filed. The Court's holding, that declaratory relief is inappropriate as to the constitutionality of the loitering ordinance, is entirely consistent with and under the authority of the holding in **Golden v. Zwickler** (supra).

5. A reading of the District Court's Memorandum Opinion demonstrates that that Court made its determination on the procedures in City Court No. 1 under the factual situation presented as is called for by the holding in **Golden v. Zwickler** (supra). The Trial Court, after considering the evidence, found that the evidence presented gave an insufficient picture of the circumstances governing bail, jury trials, appeals, etc., so that an intrusion into the City's judicial system by the Federal Court was un-

warranted and would be intolerable. While not taking a view of "expediency at the sake of justice", the District Court did take a realistic and practical view of the distinct and isolated cases presented to it. While several witnesses testified that their rights were not "air tight" in the City Court, the District Court took into consideration the fact that some 60,000 to 70,000 cases a year were heard by the City Court and that these few cases presented by petitioners did not present a fair and convincing picture of the procedures of City Court No. 1. Regarding bail, the procedure was uniformly applied to all defendants. Further, whether the bail was set by the judge or marshal, the setting of the bail by either was within the jurisdiction requirements of state statutes and the state constitution. It was also established that the "summons procedure", in lieu of bail, was utilized in the City Court, although the extent of the use of the summons procedure was not developed. The District Court recognized that the petitioners in essence were asking for a double standard to be applied in the setting of bail or bond. They were asking for one standard to be uniformly applied to the poor, although no definition of "poor" was ever suggested, and that another standard in this regard be applied to all of the citizens. As was stated in **Hogdon v. The United States**, 365 F. 2d 679, 687, the purpose of bail cannot, in all instances, be served only by accommodating the defendant's pocketbook and his demand to be free pending possible conviction. And it has also been pointed out that the mere fact that an accused is unable to furnish bail in any amount and wants to be released on his own recognizance does not present a federal question. **Pilkinton v. Circuit Court of Howell County, Missouri**, 324 F. 2d 45 (8th Cir. 1963), l. c. 46. Regarding bond pending appeal, it is discretionary with the Court whether defendant is to be granted bail at all. **Sellars v. State of Georgia**, 374 F. 2d 84 (5th Cir. 1967). Relative to having to file an affidavit of appeal the same day as conviction, the Court found that although there seemed to be

such an unwritten rule, there was no evidence that that procedure was ever strictly enforced and no evidence that an appeal sought to be taken at a later time was ever denied.

The complaint against the alleged lack of a jury trial is not a new point. Although jury trials are authorized by statute and ordinance, it is clear that the maximum penalty of a $500.00 fine and 90 days in jail is not sufficient to command a jury trial, **Baldwin v. New York**, 26 L. Ed. 2d 437 (1970); **Duncan v. Louisiana**, 391 U. S. 145 (1968), especially where appeals from City Court No. 1 result in a trial de novo. The Court pronouncements, regarding jury trials in "petty offenses, apply with equal force as to appointment of counsel in the City Courts". **James v. Headley**, 281 F. Supp. 588 (S. D. Fla. 1968); **Brinson v. State if Florida**, 269 F. Supp. 747 (S. D. Fla. 1967). This is particularly true in the City Police Courts where the offenses do not even rise to the dignity of a misdemeanor because of their civil nature. **Stokes v. Wabash Ry. Co.** (Mo.), 197 S. W. 2d 305, 308 (10).

As to the complaint that Judge Cady was discriminatory in his findings and in his sentencing, the evidence presented to the Trial Court on this subject showed that all sentences were well within the jurisdictional limit. Evidence showed that persons claiming to be in petitioners' class, who happened to be convicted, also received fines or sentences well within the jurisdictional limit. It is obvious that the District Court took into consideration, relative to Judge Cady's findings, samples of testimony such as offered by witness Hopper (R. 394). He jumped on a police officer's back, grabbed the officer around the throat and was maniacly screaming "help me kill the facsist pigs"; witness Goldman was convicted for peace disturbance for chaining herself to a revolving door of a downtown department store (R. 447-449); petitioner Percy Green, after being convicted by Judge Cady, pleaded guilty on appeal (R.

267, 268). Not only did the petitioners fail to show any discriminatory practices by Judge Cady or any unconstitutional proceedings for which petitioners had a standing to seek federal intervention, but by their offering the deposition of Judge Cady, their own evidence showed that he was in sympathy with civil rights leaders and their activities and that he does not distinguish between defendants upon the basis of label, i. e., militants, etc. (Pet. App. 18A). The District Court also correctly noted, on the basis of the record before him, that no irreparable injury was possible in City Court No. 1 due to the fact that petitioners could always utilize the devices of change of venue and disqualification of the judge to avoid Judge Cady and be heard by the black judge who sits in the other City Court should they so desire. Contrary to the suggestion of the petitioners, the District Court did make a specific finding, that the petitioners' contentions relative to the procedures in City Court No. 1, were totally without merit (Pet. App. 18A).

CONCLUSION

It is respectfully suggested that there is settled law on the matters that are raised by petitioners; and for the reasons set forth above, it is demonstrated that nothing new or novel is presented by petitioners for which this Court should exercise its discretion, and therefore the petition for writ of certiorari should be denied.

Respectfully submitted

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